NEMO TENETUR SEIPSUM PRODERE.

IF there is one example which illustrates better than another the old allegory of the gold and the silver shields, it is the controversy that has attended the maxim *Nemo tenetur seipsum prodere.* If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form and leaving it with its vigor of life unabated and its legal orthodoxy untainted, it is this rule that no man shall be compelled to criminate himself. In both these aspects, historical and controversial, the story of this maxim is full of interest.

Yet of this contrariety of impressions some explanation must be possible, if only it be discoverable. If we can throw the light of history upon this rule from its first appearance down to the time when it received its final shape, we shall be better able to judge how firm is its basis in our system of law, and how strong a claim, merely by virtue of its history and its lineage, it ought to have upon our respect. We may then weigh intelligently the various contesting considerations and be prepared to make a final adjustment of the claims of this principle to the important place which it now occupies. This we need to do, not only for the sake of reaching a verdict upon the maxim itself, but as well for the purpose of examining the clusters of lesser rules that have grown out of it, and of correcting the anomalies that flourish among them. If our verdict is favorable, let us carry the principle to its logical extent and enforce it thoroughly; if unfavorable, let its influence be discouraged and let its operation be modified to the extent which our conclusion may require.

What, then, is the history of this rule? Space requires that only a brief sketch be given here, and the filling in of details, with references to the authorities, must be left for another occasion. Briefly, these things appear: 1st. That it is not a common-law rule at all, but is wholly statutory in its authority. 2d. That the object of the rule, until a comparatively late period of its exist-

ence, was not to protect from answers in the king's court of justice, but to prevent a usurpation of jurisdiction on the part of the Court Christian (or ecclesiastical tribunals). 3d. That even as thus enforced the rule was but partial and limited in its application. 4th. That by gradual perversion of function the rule assumed its present form, but not earlier than the latter half of the seventeenth century.[1]

These are the results in brief. Let us now turn to the evidence. We are taken back to the middle of the thirteenth century. It was an epoch marked by a stubborn antagonism between civil and ecclesiastical influences. The leaders of the church were of foreign culture, and through them was exerted the powerful influence of the papal see. The barons were engaged in that defence of English liberties and so-called popular rights, which was characterized by repeated defeats on the part of kings and by the signing of successive charters. Rather as an incident than otherwise of this general struggle, it came about that the canon law and the common law were placed in opposition. From the time of Henry III., and earlier, down to the days of the first James, it is apparent that there was a constant and irritating friction between the two systems. The proclamation of Stephen in proscribing the use of the civil law,[2] and the well-known order issued by Henry III., in 1235, in regard to the teaching of law in the city of London, are some of the earlier signs of the extent and importance of the conflict.

When Henry married his French wife, in 1236, there came over with her to England her four uncles, one of whom, Boniface, was placed in the see of Canterbury,—according to one authority,—as archdeacon. In the same year, 1236 (Matthew Paris says 1237), there came over a Cardinal Otho (whose constitutions have always been regarded as of high authority), and in a conference (*Concilium Pananglicanum*) held at Saint Paul's in the same year he promulgated a constitution ordaining that the oath against calumny (*jusjurandum calumniæ*) be required in every ecclesiastical

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[1] Some interesting evidence, in a line with what will be here offered, may be found in Bentham's Judicial Evidence, vol. 5, book 9, c. 3, 4. In his brief account (to which I had not referred until the present material was quite collected) special attention is called to the absence of the privilege in common-law practice before the seventeenth century.

[2] Probably 1154. See Wilkin, Leg. Ang. Sax. 318. Joh. Sarisb., Policraticus, Lib. 8, c. 22 b.

suit, "*obtenta consuetudine in contrarium non obstante*," notwithstanding the previous custom to the contrary.[1] This *jusjurandum calumniæ* was an oath which, according to ecclesiastical practice, each party might take at the beginning of a suit, affirming among other things that he would answer truly to every question that might be asked him. It was practically identical with the oath *ex officio*, which afterwards came into prominence in the course of the controversy. What is to be noted in particular is that the phrase, "*obtenta consuetudine in contrarium non obstante*," refers to the practice obtaining in the ecclesiastical courts before that time. So far as the accessible evidence indicates, this decree was the first instance of the employment of this oath in England.

The passage rises into importance, because Coke[2] has endeavored to found upon it an argument that the custom and therefore the common law of England before this date forbade such oaths to be required, and that subsequent statutes, to which reference will be made, were therefore only declaratory of the common law. But nothing could be more wide of the mark. The only ground offered by Coke for his opinion was this clause, the meaning of which he entirely misapprehended. That it refers, not to a custom of the king's courts (of which the newly arrived cardinal could have had only the slightest knowledge), but to the previous practice in the Courts Christian, appears not only from the context of the constitution,[3] but from direct statements in the annotations of Athon as well.[4] This oath had always been administered, according to the canon law, in civil causes, but not in causes purely spiritual;[5] and in requiring it in the latter instances, Otho made an innovation which "*per expertam considerationem*" has ever since found a place in ecclesiastical practice.

Possibly, in the case of Coke, his wish fathered his opinion, for in later days (1589), as we shall see, he held a brief on behalf of one who objected to the administration of this oath; and as, between that time and the publication of his book, the highest judicial authorities had solemnly declared that this oath could be lawfully administered, the discovery of a common-law foundation for the statutory principle which he was supporting in the face

[1] Lindwood, 60; 12 Co. 68; Gibson's Codex, 1010.

[2] 2 Inst. 667.

[3] Lindwood, 61, notes (b), (c).

[4] Otho's constitutions were annotated by Actonus, known as Athon, Canon of Lincoln, who flourished about 1290, in the reign of Edward I.

[5] Corp. Jur. Canon., *De Juramento Calumniæ*, 1, 2.

of an enormous opposition would have been a rich boon to him. It is hard to escape the belief that Coke was wilfully blind to the real meaning of the passage. Not only is there no evidence in favor of Coke's belief, but the absence of any previous practice of requiring this oath in the Court Christian in the class of cases which caused the controversy (cases of ecclesiastical offences) makes it almost impossible that any opportunity could have arisen for resistance to such a practice, and for the establishment of a custom to the contrary. That any rule against the imposition of such an oath could have arisen of itself is not only contrary to the mode of development of the common law, but is entirely unlikely to have sprung up among a people familiar with the system of compurgation oaths. Add to this that a negative custom, in the sense of a custom binding as law, is a rare thing, and that in this case the rule would much more probably have arisen, if at all, through a decision as a statute, and not as a custom; for custom develops by unanimous consent, not in the midst of hot controversy.

Soon after this constitution of Otho came another, from Boniface (1272), employing the same method of procedure. It recited that in the course of investigations by the prelates "*de criminibus et excessibus subditorum suorum*," the layman "*suffulti potestate temporalium dominorum, in hujusmodi inquisitionibus citate, nolunt jurare de veritate diceda*," it ordered an inquisition and the application of the oath to witnesses.[1]

It does not appear that these decrees of Otho and Boniface met with any more opposition than other acts done in assertion of the ecclesiastical jurisdiction. The reign of Edward I. was apparently a time when the royal power favored the churchly claims, for by the statute 13 Ed. I., Circumspecte Agatis (1285), the jurisdiction of the Court Christian was materially enlarged. But in the statute known as "*Prohibitio formata de statuto articulorum cleri*" a change of policy occurred, and the foundation was laid of the privilege now under discussion. This statute enacted that the officers of the law should not permit "*quod altiqui laici in ballione sua in aliquibus locis conveniant ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis.*" There can be no doubt that this was the earliest legal opposition which the prelates encountered in their imposition of the oath.

[1] Lindwood, 109; 2 Co. 26.

It was the starting-point of to-day's rule. It is with the fortunes of this statute and its successors that we are now chiefly concerned. The date of the act is placed by Cay and other editors as of *tempore incerto* before the end of Edward II.'s reign (1326), while Coke attributes it to the first few years of Edward I.'s time.[1]

No reasons are given by the latter, however, and it seems unlikely that the administration which enacted Circumspecte Agatis could also have passed so stringent a law as the *Prohibitio Formata.* It is more probable that it belongs in the reign of Edward II. (1307–1326).

It is noticeable that the exception peculiar to this statute, "*nisi in causis matrimonialibus et testamentariis,*" appears again and again, in the succeeding years, alike in the vehement protests of the clergy and in the various royal prohibitions issued to curb the zeal of ecclesiastical officers. But the significant point about the statute is that its object was the general one of restricting the ecclesiastical jurisdiction, and the prohibition of citations to take oaths was incidental only, and was simply a means to the chief end. Just as the surest bar to a plaintiff's recovery in a common-law suit was the non-existence of a writ covering his case, so the best method of curtailing the ecclesiastical jurisdiction was to cut off that power to summon and examine which was the strength of their procedure.

That a repugnance to the oath itself did not exist, is shown by the exception in favor of *causis matrimonialibus et testamentariis.* Moreover, the statute begins by forbidding the ecclesiastical courts to take cognizance of various "matters and causes of money, and of other Chattels and Debts which are not of Testament or Matrimony," thus revealing that its real point of attack was the scope of the ecclesiastical jurisdiction. Such, too, has been the accepted significance of the law in later times. Britton understood it as preventing the ecclesiastical courts from entertaining any pleas — that is, suits — other than matrimonial and testamentary.[2] In the annals of later ecclesiastical practice, this statute is remembered chiefly, if not solely, as the origin of the limited jurisdiction of Courts Christian.[3] Furthermore, the prohibition applied only to laymen, which suggests, on the one

[1] Cay, Statutes of the Realm, I. 209; 2 Co. 600.

[2] Nichol's Britton, 35.

[3] See also the forms of the prohibitions in F. N. B., 41 A, and Reg. Brev. 346.

hand, that nothing was aimed at the oath, as in itself an object of dislike, and, on the other, that the moving influence was a jealousy of the hold the clergy were obtaining on the laity and a desire to restrict their power to persons and matters purely spiritual.

But the clergy did not accept this check as final, and the struggle continued. Articles were presented to Edward II., vainly protesting against the narrowness of their powers.[1] In Henry IV.'s time they found an administration more favorable to their cause, and a reaction took place. A statute of 2 H. IV. (1403) gave the church permission to use all the sanctions or "methods" authorized by its canons, and under this clause the oath began again to be administered. In 1408 we find Archbishop Arundel directing his clergy to denounce as heretics all who spoke against the administration of oaths by ecclesiastics.

But the tide turned once more against the church, and we find a statute of 28 H. VIII. (1533) repealing the statute of H. IV., and leaving the law as it stood before. This new statute was directed against certain clerical abuses; but it is apparent from the preamble that, in the movement of opposition now beginning, the grievance of the people and of the commons was the oath itself, or rather the detestable methods attending the church's use of it, quite as much as the general jurisdiction of the church.

At this time, then, the law stood that oaths could be administered (by ecclesiastics) to the clergy in all cases, and to laymen in matrimonial and testamentary causes. In 1 Phil. and M. the statute of H. VIII. was repealed, but 1 Eliz. saw it restored. The statute of H. VIII., however, is not heard of again for many years, and it is likely that the agitation which gave it being would have died out had not a powerful engine for the discovery of heretics now made its appearance, — the High Court of Commission, appointed by virtue of the supreme ecclesiastical authority of Elizabeth. Up to 1583 five commissions had been issued, but until the sixth, in that year, no great murmuring seems to have been heard. Now, however, Archbishop Whitgift, a man of stern Christian zeal, determined to crush heresy wherever its head was raised, was placed in charge of a commission which proceeded immediately to examine clergymen and other

[1] See 9 E. II., *Articuli Cleri;* Cay, Statute of the Realm, I. 171; see also Athon, pt. 3, p. 47.

suspected persons upon oath. From this time forward there is much concerning the oath. But the course of past practice had by no means been changed, in obedience to the statute of H. VIII. The temper of Elizabeth and of the zealous Whitgift inclined to a strong, ecclesiastical administration. The law of Henry was there on the books, but it took nearly one hundred years to win the struggle against ecclesiasticism and to put life into the statute.

There is abundant evidence of the fact that the statute of H. VIII. had by no means become generally known and carried out in ecclesiastical practice. Even as late as 1610 it seems that the Commons conceived that there was no good remedy by law against the inquisitional proceedings of the High Commission, and they remonstrated and tried to pass bills. But the clearest proof is found in the very law reports themselves, where the interpreters of the law were found ignoring the claims of this statute. The subject came up in most of the courts, though at different times in each. The earliest discoverable case in the reports is Collier *v.* Collier, in the Court of Common Pleas, in 1589. A suit for incontinence had been begun, and the defendant prayed for a prohibition, citing the writ upon the statute of E. II., as found in Fitzherbert and in the Register. According to one report, "the court would advise of it," and no decision was reached.[1] According to another report, the prohibition was granted.[2] Coke was the petitioner's attorney, and his claim was that "*nemo tenetur seipsum prodere* in such cases, but only in *causis mater. et test.*," "where," he added, "no discredit can be to the party by his oath." In Moor, 906, this appears as the ground of the decision. But in 1591 the King's Bench (Wray, C. J., Gawdy and Anderson, JJ.) refused to sustain an indictment for administering the oath against incontinence, on the ground that the oath could be lawfully administered where the offence was first presented (that is, informed of) by two men, and in this case there had been a proper presentment.[3] Thus, as we shall see, the court sustained the strict ecclesiastical rule, but ignored the statute. Finally, in 1591, the case of Cartwright, who had been for some time languishing in the hands of Whitgift, protesting against the imposi-

[1] 4 Leon. 194; Nelson, Prohibition, E. 5.
[2] Cro. El. 201.
[3] Dr. Hunt's Case, Cro. El. 262.

tion of the oath, was brought up again, and an opinion was given upon it by the Chief Justices of the Common Pleas and the King's Bench, the Chief Baron of the Exchequer, Serjeant Puckring, and the Queen's Attorney-General and Solicitor-General, to the effect that the refusal of Cartwright and his followers to take the oath was wrong.[1] This was correct enough, from the point of view of the statute, as to Cartwright, who was a minister; but his companions in durance were chiefly laymen. The court evidently intended to adopt the ecclesiastical contention. Thus in 1591 we have the King's Bench and the highest legal personages promulgating the church's rule and slighting the statute. Since Anderson, a judge of the King's Bench in 1590, afterwards (1592) filled the chief justiceship of the Common Pleas until Coke took it in 1606, this doctrine must have subsequently had a representative in the Common Pleas also.

But in 1603 James came to the throne, and the whole aspect of affairs seems now to change. In that interval of a dozen years much, apparently, had been done and said which had tipped the balance in the opposite direction. From this time the ecclesiastical cause begins gradually to decline. Before noting the decisions which mark this decline, let me call attention to two incidents which emphasize the change that had occurred. In 1583, Whitgift had prepared a list of interrogatories for certain ministers, touching their conformity, and they had appealed to Lord Burleigh to protect them. Burleigh mildly expostulated with the Archbishop, protesting that "this is not a charitable way." But the Archbishop answered firmly, and declared "it is so cleere by law that it was never hitherto called into doubt;" and mentioned a case (unreported, apparently) in Elizabeth's time where certain ones were committed to the Fleet for counselling J. S. and other papists not to answer upon their oaths.[2] Now, in 1603[3] the king called a conference of the clergy, "a famous Disputation and Examination into the Customs and Practices of this Church." In the course of a discussion about the granting of commissions by archbishops, one of the lords referred to the proceedings of these commissions, compared them to the Spanish Inquisition, and spoke of the oath *ex officio*, by which persons were forced to accuse themselves, and mentioned the case in which Burleigh had

[1] Strype's Life of Whitgift, 360, App. 138.
[2] Strype's Whitgift, p. 160.
[3] Ib. 568.

intervened, twenty years before. The crafty Whitgift then protested that the noble lord was in error, "for if any Article did touch the Party in any way, either for Life, Liberty, or Scandal, he might refuse to answer," and that his own answer to Burleigh would doubtless have satisfied the noble lord, but that as to a matter twenty years old his memory failed him. Now, in that letter to Burleigh he had, in fact, not only not made any such exception, but had vigorously defended each and every article as lawful. The new notion had, in 1603, begun to gain currency, and he realized it. One more example. When Cartwright's case came up in the Star Chamber, in 1600 or thereabouts, he made a strong defence on the ground of the unlawfulness of the oath. He was asked why he had not made the same defence twenty years before, when he was first apprehended, instead of saying merely, as he did, that such inquisitions were "contrary to the laws both of God and of the land," and that he did not wish to prejudice others by his answers. He answered that by the example of others in refusing he was induced to search farther, and had learned more than he knew twenty years before.

Let us now review hastily the decisions of the seventeenth century, bearing in mind, first, that the only legal basis for them was the statute of Edward II., as revised by those of Henry VIII. and Elizabeth; and, secondly, that the essence of the contest was a recoil against the power and methods of the ecclesiastical authorities, and that it resulted only by a kind of accident in abolishing inquisitional oaths altogether, and establishing a general privilege against self-crimination. Only sixteen years after the last solemn opinion rendered by the highest judicial authorities, the Commons asked the opinion of the justices upon the lawfulness of the oath administered in the ecclesiastical courts; and they, with Coke, Chief Justice of the Common Pleas (then recently appointed, in 1606), as their spokesman, answered[1] that the administering of any corporal oath was unlawful, by the statute of 25 H. VIII., except in causes matrimonial and testamentary. This was an official denial of the validity of the ecclesiastical rule, and it seems to have had speedy effect, for before long we find both the King's Bench and the Common Pleas upholding this policy, so foreign to the decisions of 1591. In 1609, in Mansfield's Case, presumably in the King's Bench,[2] it was held that a clergyman could be examined

[1] 12 Co. 26.

[2] Rolle's Abr., Prohibition (J), 4.

on his oath for preaching contrary to the prayer-book, "for clergymen are not within the statute." In 1610 the case of Clifford *v.* Huntley, probably in the same court,[1] held that where an answer might show the forfeiture of an obligation, one could not be compelled to answer on oath, and a prohibition would issue. A similar decision was rendered in Bradston's Case, in 1614.[2] In 1615, when the case of Dighton *v.* Holt came before the King's Bench for a prohibition to restrain the High Court of Commission from examining certain persons on oath as to their prayer-book practices, it seemed as though the statute of Henry VIII. was again to be disobeyed, and the rule of 1591 to be revived. For a year or more the case dragged on. Six adjournments took place, on more than one occasion for the express purpose of conferring with the High Court and asking them to put an end to the cause of complaint. Coke (who had become Chief Justice in 1613) evidently dreaded to be forced to decide upon his convictions (which dated as far back as the case in 1590) and against the ecclesiastical powers; but it was finally decided that the High Court had no power to examine the accused persons on oath.[3] A similar decision was reached in Jenner's Case in 1620.[4] In 1616 a prohibition was granted against the Court of the Arches, which was on the point of putting Sir William Smith to his oath concerning a transaction alleged to have involved covin and fraud.[5]

Of these cases the most important was Dighton *v.* Holt, and we gather from it two results: (1) that the matter practically still hung in the balance, and (2) that the question was essentially one of the extent of the authority of the ecclesiastical courts. In this case, furthermore, we find Coke laying it down as one reason for granting the prohibition, that the petitioner was brought in danger of a penal law. It had already been said, variously, that the liability to the forfeiture of an obligation, and the liability to be informed against, were reasons for the rule; but this reason seems first to have appeared in this case. Coke's statement, that it was the ground for the decision in Hinde's Case, was entirely incorrect;

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[1] Rolle's Abr., Prohibition (J), 6; Jura Eccles. 427, 7.
[2] K. B.; Rolle's Abr., Proh. (J) 1; Jura Eccles. 355, 9.
[3] 3 Bulstr. 48; imperfectly reported in Moor. 840; 2 Cro. 388.
[4] Probably K. B.; Rolle's Abr., Proh. (J) 5; Jura Eccles. 427, 6.
[5] Spendlow *v.* Smith, Hob. 84; Jura Eccles. 428.

and may we not suspect that the same is true of another case, not discoverable, also cited by him?[1]

This series of decisions would seem to have established the foundation of the rule which soon afterwards came to be regarded as having a common-law origin, and ultimately took the shape of the present privilege against self-crimination. But nothing can be clearer than that it was a statutory rule, and was so regarded. Many other cases occur in which the rule was disputed in one aspect or another, and the statutory authorities, already referred to, were frequently cited; but after 1620 no other case seems to occur until 1658. At this point, however, upon a bill for relief and discovery, brought on a charge of evading customs laws and attempting bribery, the whole ground was fought over again, in the case of Attorney-General *v.* Mico,[2] and the matter was again left in an uncertain condition. With Hardres and Archer for the plaintiff, and with Atkins, Stephen, and Shafter for the defendant, the arsenal of arguments was searched and numbers of (apparently) unpublished precedents were brought out on either side. The idea of a conflict of jurisdiction as the reason for claiming the privilege against self-crimination appears throughout the defendant's argument. The court, however, rendered no decision. The time had not yet come for the adoption of the privilege in the civil courts. In 1662 a case of a similar sort in the Exchequer[3] was adjourned without decision, though the court inclined to the plaintiff's side. In Scurr *v.* Chancellor of York, in 1664,[4] the question again arose upon a demand for a prohibition, the plaintiff having been examined on oath on a charge of keeping his hat on in church; but the case was never decided, according to one report; was decided upon a different ground, according to another report. Keble says that the court was divided. But in Taylor *v.* Archbishop of York,[5] and in Goulson *v.* Wainwright,[6] in 1669, the statutory rule was enforced,

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[1] Hinde's Case, Dyer, 175 (1559), is a mere note, but the absence of any reference to the statute shows how little recognition it had received at that time. The king had appointed a commission to examine into the title of an officer, Skrogs, the clerk of a justice. Skrogs refused to answer, and he was committed to the Fleet. But he was released by the justices of the Common Bench, because "he was a person of the court and necessarie member of it." Now, the reporter adds, "*Simile* M. 18, fo, p Hind, who refused *jurare coram justiciis ecclesiæ super articulas pro usura.*"

[2] Exch., Hard. 139.

[3] Attorney-General *v.* ——, Hard. 201.

[4] Sid. 232; 1 Keb. 812; quoted in 2 Lev. 247.

[5] K. B.; 2 Keb. 252; Jura Eccles. 362.

[6] Sid. 374.

Only one more case seems to have occurred in which the rule was disputed with any vigor, but on this occasion its very foundations were assailed. The struggle to overthrow it was like the last great revolt of a once powerful idea, when the result hangs for a time in suspense, and the unsuccessful cause is at last crushed out forever. This was the case of Farmer *v.* Brown, in 1679.[1] The plaintiff raised the point that the Ecclesiastical Court could administer an oath only *in causis matrimonialibus et testamentariis;* the defendant denied that the court was restricted to such causes. A prohibition was finally granted. It appears from the language in the case that the privilege of refusing to answer was already put forward as of general validity, that it rested no longer merely on the antagonism of two jurisdictions, but was a privilege to be claimed in any court whatever. The cases henceforward are occupied only with developing the details of the principle.

Meanwhile, however, and before the last five cases had occurred, two statutes had intervened to push the matter beyond the need of decisions. It is probable that the second of the two was the result of the discussion in Attorney-General *v.* Mico, in 1868. The first of these was 16 Car., I. c. 2 (1641), and provided that no one should impose any penalty in ecclesiastical matters, nor should "tender . . . to any . . . person whatsoever any corporal oath whereby he shall be obliged to confess or accuse himself of any crime or any . . . thing whereby he shall be exposed to any censure or penalty whatever." This probably applied to ecclesiastical courts alone. The second (13 Car. II., c. 12, 1662) is more general, providing that "no one shall administer to any person whatsoever the oath usually called *ex officio*, or any other oath, whereby such persons may be charged or compelled to confess any criminal matter." It would seem that these enactments should have settled the matter beyond all doubt in 1641, or at any rate in 1662; but in fact we find these last few cases in the King's Bench and the Exchequer mooting the question apart from the statutes, and seemingly in entire ignorance of them. The statute of 13 Car. II. is cited in Scurr's Case, but otherwise neither of them seems to have been mentioned; nor do the text-books, as a rule, take any notice of them. Henceforward, however, no question arises in the courts as to the validity of the privilege against self-crimina-

[1] 2 Lev. 247; T. Jones, 122; 1 Vent. 339; Nelson's Abr., Prohibition, F. 20.

tion, and the statutory exemption is recognized as applying in common-law courts as well as in others.[1]

A brief space must suffice for referring to two other interesting aspects of our subject, — first, the origin of the maxim *nemo tenetur*, etc., as applied to the privilege in question; secondly, the definition and limitation of the privilege, as it appeared in the common-law courts after the seventeenth century.

The fact is that the maxim *nemo tenetur* was an old and established one in ecclesiastical practice. Experience had resulted in the adoption of a principle very similar to the common-law rule requiring a presentment in the shape of an indictment or an information, before a subject might be put upon his trial. It was the practice that whenever a prosecution was instituted by some informer or other third party, the oath need not be taken as to the crime charged (though questions on other matters were allowed); but if the Ordinary proceeded upon a presentment, the accused was obliged to purge himself by his oath as to *criminis ipsius*. The whole rule was embodied in the maxim, "*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenentur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*"[2] This was the form of the rule about 1590 or 1600, when the struggle between the two jurisdictions was at its height. There was more or less pamphleteering on the subject of the oath; and finally a judgment of nine civilians was given, establishing the lawfulness of the oath in canonical practice, and laying down the above rule.[3] As late as 1749 the influence of the same rule seems to have remained, for in a book of practice of that time[4] it is said, after referring to the defendant's privilege of non-crimination, that "if the fame of it is proved or confessed, the defendant ought to answer to the positions (charges), although they be criminal, or if he doth refuse, he is to be pronounced *pro confesso*, after being admonished to answer." The maxim *nemo tenetur*, therefore, never meant, in its proper sphere, what it

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[1] Rex *v.* Lake (Exch.), 1665, Hard. 364; Penrice *v.* Parker (Ch.) 1673, Finch; Anon., 1 Vern. 60, 1682; Bird *v.* Hardwicke, 1 Vern. 109 (1682); African Co. *v.* Parish, 1691, 2 Vern. 844; Sir Basil Firebrass' Case (Ch.), 1701, 2 Salk. 550.

[2] "Though no one is bound to become his own accuser, yet when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself."

[3] Strype's Whitgift, p. 339, App. 136, *et passim*.

[4] Conset's Practice of Spiritual Courts, p. 384, part vii. c. 1, 6.

now stands for. *Prodere* was used in the sense of "to disclose for the first time," "to reveal what was before unknown." The whole maxim, far from establishing a privilege of refusing to answer, expressly declares that answers must be given, under certain conditions (which are always fulfilled at trials in our courts of justice). It is certainly a satisfaction to learn that, after all, no such maxim as "no one ought to be obliged to say whether he is guilty," was ever formulated by the European jurists. We have in later years accepted it, with its Latin dress, as a supposed bequest from earlier thought, but our present rule never possessed any such sanction. It must stand, if at all, upon its merits alone.

So far as I have been able to discover, the first person to use the four words *nemo*, etc., apart from their context was Coke himself, in the case of Collier *v.* Collier. Coke's integrity hardly appears to advantage in the history of this controversy. He gave forth an erroneous interpretation of Otho's statement, which a sincere man can hardly be imagined as making; he misquoted Hinde's Case to his own advantage, where no opportunity for error seems to offer itself; and now he is found employing in his argument a partial and misleading statement of this rule of ecclesiastical practice. However this may be, it is certain, on the one hand, that the maxim as it is in use to-day was, in its origin, the broken half of a rule of quite the contrary import; and, on the other, that its currency was gained and its present sense acquired in the course of the controversy of the seventeenth century.

This maxim, or rather the abuse of it in the ecclesiastical courts, helps in part to explain the shape which the general privilege now has taken. The exact circumstances of the transition are somewhat obscure, perhaps necessarily so. But we notice that most of the church's religious investigations, the cause of all the trouble, were conducted by means of commissions or imquisitions, not by ordinary trials upon proper presentment; and thus the very rule of the canon law itself was continually broken, and persons unsuspected and unbetrayed "*per famam*" were compelled, "*seipsum prodere*," to become their own accusers. This, for a time, was the burden of the complaint. In 1589, for example, we read, in a protest by "divers of these persons required to make answer upon their oaths," that "they are not bound to accuse themselves; that in accusing others they should violate

the laws of friendship; that they will not serve as informers for their brethren."[1] So, in the cases of Collier (1589), Bradston (1614), and Dighton *v.* Holt (1615), *ante*, the same idea appears, that a man ought not "to discover sufficient matter for an Informer to Inform against him on the Statute." Furthermore, in rebelling against this abuse of the canon-law rule, men were obliged to formulate their reasons for objecting to answer the articles of inquisitions, and they naturally used such expressions as that to answer "would draw them in danger of a penal law," "would discover the forfeiture of an obligation," "would bring temporal punishment or loss." They professed to be willing to answer ordinary questions, but not to betray themselves to disgrace and ruin, especially where the crimes charged were, as a rule, religious offences, and not those which men generally regard as offences against social order. In this way the rule began to be formulated and limited, as applying to the disclosure of forfeitures and penal offences.

In the course of the struggle the aid of the civil courts was invoked. The contest as thus fought out and the privilege as finally established had sole reference to the usurpations of the ecclesiastical courts. But the issue had been so important a one, and men's minds had become so familiar with the idea of this privilege, that it began to be stated in general terms; and towards the end of the seventeenth century, as we have seen, it found a lodgement in the practice of the Exchequer, of Chancery, and of the other courts. There had never been in the civil courts any complaint based on the same lines, or any demand for such a privilege. The latter jurisdictions seem to have been quite free from anything of the sort. But the momentum of this right, wrested from the ecclesiastical courts after a century of continual struggle, fairly carried it over, and fixed it firmly in the common-law practice also.

And now what shall we say of this privilege to-day? It had a use once. Has it a use now? There was a demand for it three centuries ago, as a safeguard against an extraordinary kind of oppression, which, like witchcraft, has passed away forever. Is there a demand now? I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry. As a bequest of

[1] Strype's Whitgift, 331.

the seventeenth century, it is but a relic of controversies and dangers which have disappeared. As a rule of canon law, it never was accepted as we accept it; the experience of the civilians led them in reality to quite opposite conclusions. We may, therefore, disregard sentiment and the supposed weight of experience, for there is no place for them.

As to its intrinsic merits, then, may we not express the general opinion in this way, that the privilege is not needed by the innocent, and that the only question can be how far the guilty are entitled to it? This fact, that no innocent man needs to claim this privilege, has always been the strong argument with those who attack it. The weakness of its defenders has lain in their habit of insisting that it has indispensable advantages for those who are groundlessly accused, and in their failure to face directly the question of real difficulty and doubt, whether or not some concession should not be made for the benefit of the guilty. I imagine that to-day the average lawyer, as well as the average layman, if asked for his candid opinion, would admit that in the nature of things there is no reason why, if an accused person is innocent, he should be unwilling to say so, and to explain the facts of his conduct and vindicate himself, — always assuming, of course, that a charge has been made with proper solemnities, and that he is not called upon, in inquisitorial style, to answer hasty accusations without weight. The same lawyer (for I cannot imagine a layman adding a "but" to this view) would add, however, that his fear was that even the innocent man might be trapped and entangled into damaging statements by the wiles of the cross-examiner. If this be so, then surely the evil lies in an abuse of that potent force, cross-examination, and a remedy can be applied where it is needed. Cross-examination, and not trial by jury, as an able Japanese lawyer once said to me, is the real glory of Anglo-American procedure; but there can be no doubt that cross-examination, in its native regions, has been allowed to run wild, and justice has suffered in consequence. If cross-examination endangers an innocent man, it is the abuse, not the proper use of it, which is to blame.

When we come to consider what allowance should be made for the guilty, we perceive immediately that there is ample ground for restricting and defining the liability to be brought to book for one's misdoings. We acknowledge, by our statutes of

limitation and our periods of prescription, that there is a time beyond which it is not expedient to redress wrongs and to punish crimes. In the same way there are limits to the places where, and the occasions when, investigations into wrongs and crimes may with profit be made. Disproportionate inconvenience, needless annoyance, continual opportunity for the gratification of personal spite and malevolence, a natural and inevitable fear of the witness-stand as a place of inquisition and a resulting injury to justice, — these are some of the consequences which warn us against subjecting the guilty to an unlimited liability of interrogation. Justice is above all a practical aim, and human nature must be taken as it is. It is useless to demand that the privilege shall be totally abolished. As has happened so often in Anglo-American jurisprudence, a principle inherited from the days of Brian or Coke or Hale has happened to answer to some demand of modern life, and is still accepted, in part or entirely, though on grounds quite new and different; and so it is in this case.

The plan which will here be suggested is this: Let us abolish the old privilege, and provide in its stead for a general freedom of questioning, establishing limits, however, in the shape of certain exceptions. (1.) On one such exception I suppose that all would be agreed, namely, that no incriminating question be allowed upon a point not material to the main issue. This exception would remove all opportunity to annoy or to disgrace by questions probing into secondary topics, and would confine the interrogations to the limits strictly necessary for the investigation of the matter in hand. (2.) If any further extension of the privilege were desired, it might be granted indiscriminately to all *witnesses* (other than the accused). That is, none but accused persons need answer criminating questions, and then only on points material to the issue. Some such safeguard might be thought necessary for preventing the witness-box from becoming a place of dread and dislike, and for guaranteeing the due supply of witnesses. I am inclined to think, however, that the first exception alone would satisfy the needs of justice. By putting the question of materiality in the hands of the presiding judge alone, without appeal, we should avoid the danger of adding to the volumes of reports and of protracting litigation, and should put ourselves in line with one of the great and needed reforms of the day.

Space prevents me from referring to other interesting aspects

of the privilege, where some remodelling might not be amiss. There is no reason why our profession should not begin now to move in this reform. Hallam calls this privilege "that generous maxim of English law," and can find no more to say in its favor. But this is one of the cases where we must be just before we are generous. Every day, in some court of some city, justice is miscarrying because of this extraordinary maxim (nothing in truth, but a misquotation consecrated by age), "*nemo tenetur seipsum prodere.*"

John H. Wigmore.

TOKIO, JAPAN, 1891.